International Covenant on Civil and Political Rights

Distr.: General
8 September 2017

Original: English

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2196/2012*, **

Submitted by:	K.E.R. (represented by counsel, Alyssa Manning)
Alleged victim:	The author
State party:	Canada
Date of communication:	19 September 2012 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 21 September 2012 (not issued in document form)
Date of adoption of decision:	28 July 2017
Subject matter:	Removal from Canada to the United States of America of a conscientious objector
Procedural issues:	Failure to substantiate claims; incompatibility *ratione materiae* with the provisions of the Covenant
Substantive issues:	Arbitrary arrest or detention; right to a fair trial; arbitrary or unlawful interference with family or home; right to freedom of thought, conscience and religion; right to freedom of expression; right to family life; right to an effective remedy
Articles of the Covenant:	2 (3); 9; 14; 17; 18; 19; and 23
Articles of the Optional Protocol:	2 and 3

1.1 The author of the communication is K.E.R., a national of the United States of America born in 1982. On 6 March 2007, the author applied for refugee protection status in Canada as a conscientious objector to continued military service in the United States military. At the time of the initial communication, the author was facing removal to the United States following the rejection of her application for protection status. The author

* Adopted by the Committee at its 120th session (3-28 July 2017).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. Pursuant to rule 90 (1) (a) of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the present communication.

GE.17-15629(E)

Please recycle

claims to be a victim of violations by the State party of her rights under articles 2 (3), 9, 14, 17, 18, 19 and 23 of the Covenant. The Optional Protocol entered into force for the State party on 19 August 1976. The author is represented by counsel.

1.2 On 21 September 2012, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, informed the author that it had denied her request for the provision of interim measures consisting of the issuance of a request to the State party to refrain from removing her to the United States pending the examination of her communication. The author and her family were subsequently returned to the United States, and the author was convicted of desertion and sentenced to 14 months' imprisonment.

The facts as submitted by the author

2.1 The author was born in 1982 in the United States. She is married and has four minor children born in 2002, 2004, 2009 and 2011, respectively. Her two oldest children were born in the United States and the two youngest in Canada. The author joined the United States military in 2006. She was stationed with a unit at Fort Carson, Colorado. She was a devout Christian when she joined the military. At the time, she did not feel that military service in Iraq would conflict with her religious and moral convictions. She was deployed with her unit to Iraq in October 2006, where she served until she returned to the United States in January 2007 for a two-week period of authorized leave. She was expected to report back for duty in Iraq after her leave period.

2.2 During her deployment in Iraq, the author developed sincere moral and religious objections to the actions of the United States in the conflict, and she determined that she could no longer in good conscience participate in the armed military action of the United States military in Iraq, which she considered to be morally wrong, likely illegal and contrary to her deeply-held religious convictions. The author further notes that her position on the use of force and participation in armed conflict developed further following her desertion and move to Canada. She is now an absolute pacifist objector to military service. The use of force is contrary to her religious and moral convictions and, further, she believes that the United States forces routinely engaged in breaches of the Geneva Conventions relating to the protection of victims of international armed conflicts during the course of their operations in Iraq.

2.3 The author attempted to raise her religious concerns with her superiors while on her two-week leave in the United States. However, her concerns were dismissed and she was informed that she would be punished and, potentially, imprisoned if she did not return to her unit in Iraq. Her options were either to return to Iraq and continue military service in a conflict contrary to her beliefs, to face punishment for a refusal to return to military service in Iraq, or to go absent without leave from her unit. The author therefore decided to depart for Canada with her family.[1] They entered Canada on 18 February 2007 and applied for refugee protection on 6 March 2007.

2.4 In Canada, the author has been publicly vocal about her sincere objections to military service in general and to military service in the conflict in Iraq in particular. After she departed for Canada, an arrest warrant was issued against her in the United States for desertion. She claims that, although 94 per cent of military deserters in the United States are not selected for formal punishment, court martial or incarceration, military personnel who have been outspoken about their political, moral and religious objections to military service are targeted for prosecution, and prosecutors have argued that public expressions of

[1] The author refers to a statement by Amnesty International dated 19 September 2012, issued specifically in support of her complaint. It is noted in the statement that while the United States military offers soldiers the option of applying for conscientious objector status, many genuine conscientious objectors have had their applications for such status refused. It is further noted in the statement that Amnesty International has observed that many United States soldiers who have maintained principled objections to military service have been imprisoned, some of them imprisoned pending applications for conscientious objector status or deployed to war zones despite pending applications for that status.

conscientious objection to military service warrant a more severe punishment and incarceration.

2.5 The author's application for refugee protection in the State party was denied by the Immigration and Refugee Board of Canada on 26 October 2007. The Board determined that she would be afforded due process guarantees in the United States military justice system if she were to be prosecuted for desertion. The author claims that the Board did not consider whether her imprisonment on return to the United States would engage or violate her rights under articles 14, 17 and 18 of the Covenant. The author sought judicial review of the decision before the Federal Court of Canada; however, her application for judicial review was dismissed on 25 March 2008 without reasons. The author subsequently applied for permanent residence on humanitarian and compassionate grounds. On 8 December 2008, this application was denied, and the author was served with a negative decision in respect of her pre-removal risk assessment application. The author sought judicial review of both the negative pre-removal risk assessment decision and the negative humanitarian and compassionate decision. The negative humanitarian and compassionate decision was dismissed by the Federal Court on 12 March 2009, while her application for judicial review of the negative pre-removal risk assessment decision was granted on 10 August 2009 and the decision was remitted to the Immigration and Refugee Board for reassessment. In August 2009, the author also filed a second application for permanent residence on humanitarian and compassionate grounds. On 30 August 2012, the author was served with a negative decision in respect of her second pre-removal risk assessment application. The author argues that the pre-removal risk assessment officer did not consider that her imprisonment would amount to a violation of her right to freedom of thought, conscience and religion. She applied for judicial review of this decision, which was rejected on 7 February 2013.

The complaint

3.1 In her initial submission dated 19 September 2012, the author submits that her removal to the United States would put her at risk of persecution on the basis of her conscientious objection to military service. She argues that, upon removal to the United States, she would be detained by the United States military and prosecuted for desertion. Once there, she would likely face imprisonment for a period of two to five years. She would have no opportunity to escape judicial sanctions for desertion as, under the United States Uniform Code of Military Justice, desertion is a strict liability offence. The author argues that conscientious objection to military service is an inherent component of the right to freedom of thought, conscience and religion, as protected under article 18 of the Covenant. The author refers to the Committee's jurisprudence according to which the right to freedom of thought, conscience and religion entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religious beliefs.[2]

3.2 The author claims that, because of her profile as a conscientious objector, she would be subjected to a more severe punishment than others in a similar situation. She notes that a majority of deserters from the United States military are not formally prosecuted, but that a small number of deserters are selected for prosecution because of their profile as conscientious objectors and critics of the war efforts led by the United States in Iraq.[3] The author refers to the *Handbook and Guidelines on Procedures and Criteria for Determining*

[2] The author refers to the Committee's jurisprudence in communications Nos. 1321/2004 and 1322/2004, *Yoon and Choi v. Republic of Korea*, Views adopted on 3 November 2006; Nos. 1593-1603/2007, *Jung et al. v. Republic of Korea*, Views adopted on 23 March 2010; Nos. 1642-1741/2007, *Jeong et al. v. Republic of Korea*, Views adopted on 24 March 2011.

[3] The author refers to a decision of the Canadian Federal Court, *Hinzman et al. v. Canada*, case No. IMM-3813-08, in which it was noted that evidence indicated that the laws relating to the punishment of desertion by the United States military were applied differently in the exercise of prosecutorial discretion based on the individual deserter's profile as an opponent or critic of the United States war effort. The majority of deserters were released from the military without prosecution and received at most a dishonourable discharge. A small number who were on public record for their criticism abroad were prosecuted and jailed.

Refugee Status, issued by the Office of the United Nations High Commissioner for Refugees, para. 169, which recognizes as persecution differential punishment for desertion based on a soldier's religious or political opinions. She submits that her removal to the United States, leading to her incarceration and differential and more severe punishment for her refusal to perform military service based on her profile as a conscientious objector was foreseeable upon her removal and amounts to a violation of her rights under article 18 of the Covenant.

3.3 The author notes that, while she is a pacifist objector who objects generally to participation in armed conflict, she objects specifically to being associated with condemned military conduct that routinely involves breaches of the Geneva Conventions. She claims that she initially objected to further service with the United States military in Iraq, as such service required her to be associated with breaches of the Geneva Conventions.[4] The author refers to the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* and argues that punishment for desertion amounts to persecution when the desertion is motivated by a refusal to associate with condemned military conduct.[5] The author further argues that her refusal to be associated with condemned military conduct is not a factor that she would be able to raise in her defence at court-martial proceedings on desertion charges, as the defence against unlawful orders in the United States only permits soldiers to refuse direct orders to commit war crimes and cannot be associated with breaches of the Geneva Conventions.[6] The author further argues that no viable alternative to military service was available to her that would not have conflicted with her sincere objections to military service. She submits that imprisoning her for refusing to be associated with condemned military conduct would amount to persecution in violation of her rights under article 18 of the Covenant.

3.4 The author also claims that court-martial proceedings in the United States are not independent or impartial. She argues that the United States military justice system retains a structure in which the soldier's commanding officer maintains significant control over the entire court-martial proceedings: the court-martial convening authority determines which soldiers are prosecuted, which charges are laid by the prosecution and which level of court martial the soldier will undergo, selects the court-martial members [jury], who remain under the command of the convening authority, makes decisions related to both prosecution and defence witnesses and ultimately must sign off on the court-martial disposition and sentence prior to the initiation of any limited appellate review proceedings. The author therefore considers that, upon her removal to the United States, it was foreseeable that she would face judicial proceedings before a tribunal that was not independent and impartial, in violation of her rights under article 14 of the Covenant.

3.5 The author further submits that her removal to the United States would also entail the removal of her husband and four children, and would amount to an arbitrary and unlawful interference in her family life, in violation of articles 17 and 23 of the Covenant. In that connection, she notes that her four children and her husband rely on her in the activities of their daily life. Her husband has a disability, suffering from restricted mobility, chronic pain, chronic depression, diabetes and decreased liver function. He is therefore unable to maintain employment or adequately care for himself and the children without the author's assistance; she is the children's primary emotional and educational support and is

[4] The author refers to the above-mentioned statement from Amnesty International dated 19 September 2012, in which it is noted that Amnesty International had issued several reports detailing allegations of gross human rights violations, including torture, ill-treatment and deaths in custody, amounting to grave breaches of the Geneva Conventions, by coalition forces in Iraq, including United States forces, and to a report by the International Committee of the Red Cross, issued in 2004, on the treatment by the coalition forces of prisoners of war and other persons protected by the Geneva Conventions in Iraq during arrest, internment and interrogation.

[5] The author refers to the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (para. 171), which provides that, where the type of military action with which an individual does not wish to be associated is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

[6] The author refers to an affidavit by a United States military law expert, dated 3 December 2010.

responsible for all daily tasks related to them. The author submits that she is particularly important to her eldest son, who has been diagnosed with depression, anxiety, attention deficit hyperactivity disorder and learning disability, and therefore requires additional support and time from her. She argues that, upon their removal to the United States, it was foreseeable that she would be separated from her family during the court proceedings and her subsequent imprisonment. She also argues that her two older children came to Canada when they were 5 years and 3 years old, respectively; their entire education has taken place in Canada and they have no meaningful association with any community other than their community in Canada. The author notes that, although her two youngest children have a right to stay in Canada as they are Canadian citizens, they have no practical means of enforcing this right upon the removal of their parents and siblings to the United States.

3.6 The author argues that her family's interests would be substantially and negatively affected by her removal to the United States and would not be in the best interests of her children. She submits that she raised these concerns in her application for permanent residence based on humanitarian and compassionate grounds. This application was still pending at the time of her scheduled removal to the United States. The author claims that her removal to the United States would amount to a violation of her rights under articles 14, 17, 18 and 23 of the Covenant and that, by forcibly removing her and her family prior to an adjudication of their application for permanent residence, her right to an effective remedy under article 2 (3) of the Covenant would be violated.

3.7 In her comments on the State party's observations on the admissibility and merits of the communication, dated 3 February 2014, the author also claimed a violation of her rights under articles 9 and 19 of the Covenant.

State party's observations on admissibility and the merits

4.1 In its observations dated 8 March 2013, the State party submits that the communication should be declared inadmissible under articles 2 and 3 of the Optional Protocol and rule 96 (b) and (d) of the Committee's rules of procedure as incompatible with the provisions of the Covenant, and also owing to the author's failure to substantiate her claims for purposes of admissibility. Alternatively, should the Committee find that the communication is admissible, the State party submits that the complaint is without merit.

4.2 The State party describes the domestic proceedings conducted in the State party concerning the author's application for protection status. The State party notes that the author and her family claimed protection as refugees under the Immigration and Refugee Protection Act on 6 March 2007, alleging a well-founded fear of persecution based on religion, political opinion and membership of a particular social group. Before the national authorities, they also claimed protection based on a fear that, if returned to the United States, the author could face a risk of torture, a risk to life and/or a risk of cruel and unusual treatment or punishment.

4.3 On 24 August 2007, the author's claims were heard before the Refugee Protection Division of the Immigration and Refugee Board of Canada. At the hearing, the author and her family were represented by counsel. The Refugee Protection Division is an independent, quasi-judicial, specialized tribunal that considers applications for protection based on a fear of persecution, torture or other serious human rights violations. By its decision of 26 October 2007, the Division determined that the author was not a Convention refugee within the meaning of section 96 of the Immigration and Refugee Protection Act or article 1 of the Convention Relating to the Status of Refugees, or a person in need of protection within the meaning of section 97 of the Immigration and Refugee Protection Act.[7] The Division considered that the legality of the conflict in Iraq was not relevant to determining whether United States military deserters should be granted refugee protection in the State party. It

[7] The State party notes that section 97 of the Immigration and Refugee Protection Act mandates the protection of persons who, on removal from the State party, would face a risk to their life, a risk of cruel and unusual treatment or punishment or a risk of torture within the meaning of art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

referred to two decisions of the Federal Court of Canada,[8] in which the Court had concluded that, although alleged violations of international humanitarian law could, in certain circumstances, be relevant to a claim for refugee protection, the overall legality of a conflict or war itself was not relevant.[9] The Division accepted that the author held a political opinion, namely opposition to the war led by the United States in Iraq. However, it rejected her claim on the basis of the availability of State protection in the United States. It further noted that the author had made only limited attempts to inform herself of the availability of conscientious objector status in the United States, noting that it was possible to make such a status claim in the United States military. It also concluded that, even if the author was punished for her desertion, any such punishment would be in accordance with a law of general application and would be imposed only after a court martial in which the author would be accorded the right to counsel and the right to due process.

4.4 On 13 September 2007, the author submitted an application for permanent residence in Canada on humanitarian and compassionate grounds. The State party notes that such applications are considered by the Minister of Immigration, Refugees and Citizenship or his or her delegate in order to determine whether a person applying for a permanent resident visa from outside Canada would suffer unusual, undeserved or disproportionate hardship. On 8 December 2008, the application of the author and her family was denied. The officer in charge determined that the author had not established that she would face unusual and undeserved or disproportionate hardship. The officer also found that adequate protection for the author was available in the United States, as she would be afforded due process in the event that she was subjected to court-martial proceedings, an administrative discharge or non-judicial punishment upon return to the United States. The officer also concluded that the author and her family had not integrated into Canadian society to a level sufficient to warrant permanent residence on humanitarian and compassionate grounds. The officer also considered the best interests of the children, noting that the family would be removed together and would not face family separation and that, even if the author was incarcerated upon return, the children would still be provided for and cared for by their father and their extended family in the United States.

4.5 On 5 August 2008, the author and her family applied for a pre-removal risk assessment under the Immigration and Refugee Protection Act. A foreign national who is awaiting removal from Canada and who alleges risk of harm in his or her destination country may apply for a pre-removal risk assessment and will not be removed while the assessment is pending. For persons who have already had an initial decision from the Refugee Protection Division, a pre-removal risk assessment application is an evaluation largely based on new facts or evidence demonstrating that the person is at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. In her application, the author did not allege that there had been any new developments in the risks she faced since her Refugee Protection Division determination. However, she submitted as evidence a number of documents that had not been submitted to the Refugee Protection Division. On 8 December 2008, the author's and her family's pre-removal risk assessment application was rejected. The pre-removal risk assessment officer noted that they had alleged substantively the same risks that had been considered by the Division. The officer concluded that the author would be afforded due process in any court-martial proceedings, including with respect to any punishment imposed; that she would not suffer persecution based on political opinion if she were returned to the United States; and that she had not demonstrated that she would be at real risk of torture or cruel and unusual treatment or punishment, or a risk to her life.

[8] *Hinzman et al. v. Minister of Citizenship and Immigration*, decision No. 2006 FC 420 and *Hughey v. Minister of Citizenship and Immigration*, decision No. 2006 FC 421.

[9] The State party refers to *Hughey v. Minister of Citizenship and Immigration* (para. 153), in which the Court concluded that, in the case of a foot soldier such as Mr. Hughey, the focus of the inquiry should be on the law of *jus in bello*, i.e. the international humanitarian law governing the conduct of hostilities during an armed conflict. In that context, the task for the Immigration and Refugee Board was to consider the nature of the tasks that the individual had been, was, or would likely be called upon to perform "on the ground".

4.6 The State party notes that on 10 August 2009, the Federal Court granted the application by the author for judicial review of the negative pre-removal risk assessment decision. It held that the pre-removal risk assessment officer had not considered one of the risks alleged by the author, namely that she would be subjected to differential selection for prosecution upon return to the United States based on her political opinion. The application was therefore returned for a redetermination by a different pre-removal risk assessment officer.

4.7 In her second pre-removal risk assessment application, the author alleged that she would face several kinds of risk upon return to the United States, all on the basis of political opinion and/or religious belief, namely that she would be denied a fair trial in a court-martial proceeding; that there would be a differential selection for prosecution by court martial and differential or disproportionate judicial punishment; that she would risk being subjected to a disproportionate non-judicial punishment, hazing [harassment] and mistreatment; that she would risk being subjected to cruel and unusual treatment from other members of the military and members of the general public; that she would face harsh imprisonment conditions and a lack of adequate medical care for her post-traumatic stress disorder; that she would be separated from her family because of her incarceration, with negative impacts on the development of her children, on her husband's mental health and on her own mental health; and that she would have difficulties in finding employment, a denial of her right to vote, limited access to financial credit and limitations on international mobility.

4.8 On 26 July 2012, the second pre-removal risk assessment application by the author and her family was rejected. The State party notes the officer's finding that the applicants had not demonstrated that the United States court-martial system was unfair at face value or that the alleged risk of a denial of fair trial rights would amount to a risk of persecution. The officer noted that the maximum punishment for desertion in time of war was the death penalty, but that the imposition of such a punishment would be objectively unreasonable, since the death penalty had not been imposed on a United States soldier for desertion since 1945. The officer also considered that there was not sufficient evidence to conclude that non-judicial punishment would be imposed on the author in a persecutory manner on the basis of her beliefs, or in a manner that would amount to cruel and unusual treatment or punishment, since the evidence invoked by the author consisted of unsubstantiated affidavits giving one-sided accounts of incidents, and hazing was prohibited under army regulations. The officer further concluded that the risks of cruel and unusual treatment from other members of the military or the general public and of potential difficulties in finding employment, denial of the right to vote, limited access to financial credit and limitations on international mobility, all alleged by the author, would not amount to persecution or otherwise warrant protection. The officer considered that the author did not substantiate her allegation that she would be subjected to harsh imprisonment conditions. The officer noted that numerous programmes to support service members with post-traumatic stress disorder were in place in the United States. Finally, the officer concluded that the author's children did not face a risk of persecution upon return to the United States and that the alleged impact on the author's family, if she were to be separated from them, was not a factor to consider during the pre-removal risk assessment, but only in assessments of applications on humanitarian and compassionate grounds. The officer therefore concluded that the author and her family would not suffer persecution on the basis of political opinion or face a real risk of torture, a threat to their lives or cruel and unusual treatment or punishment if returned to the United States.

4.9 The State party submits that the author's claims under articles 14, 17, 18 and 23 (1) are inadmissible *ratione materiae*. It considers that the risks alleged by the author do not engage the responsibility of the State party as the removing State because they do not constitute the kind of irreparable harm contemplated by articles 6 and 7 of the Covenant. Alternatively, the State party submits that the author's claims are inadmissible as being manifestly unfounded, as she did not substantiate her claim that she faced a foreseeable risk of violations of her rights under the Covenant that was serious enough to trigger an obligation of the State party not to return her and her family to the United States.

4.10 The State party notes that the author has not alleged that the State party has directly violated her rights under articles 14 and 18, but rather that her claims under these provisions are based on the treatment that she considers was foreseeable upon her return to the United States. The State party notes that, under article 1 of the Optional Protocol to the Covenant, the Committee can only consider communications submitted by individuals who claim to be victims of a violation by the State party. The State party submits that, even if the author had substantiated her claim that she would be subjected to violations of articles 14 and 18 in the United States — which the State party rejects — this would not engage the State party's responsibility. The State party refers to paragraph 4 of the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which States parties have an obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm. The State party submits that the risks alleged by the author under articles 14 and 18 do not rise to the level of risk contemplated under articles 6 and 7 of the Covenant. It argues that, consequently, States parties to the Covenant have no obligations in relation to other States' potential violations of Covenant rights that do not rise to the level of violations of articles 6 and 7 of the Covenant. The State party also refers to the judgment of the European Court of Human Rights in *Soering v. the United Kingdom* (application No. 14038/88, decision of 7 July 1989, para. 86), according to which article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms could not be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State should not surrender an individual unless satisfied that the conditions awaiting him or her in the country of destination were in full accord with each of the safeguards of the Convention. The State party also refers to the judgment of the European Court of Human Rights in *Z and T. v. the United Kingdom* (application No. 27034/05, decision of 28 February 2006), in which the applicants, members of a Christian minority in Pakistan, alleged that their removal to Pakistan would amount to a violation of their right to freedom of religion. The Court noted that the responsibility of a returning State might, in exceptional circumstances, be engaged when the person concerned alleged a real risk of a flagrant violation of the freedom of religion in the receiving State, but that it would also be difficult to imagine a sufficiently flagrant violation that would not also involve treatment in violation of article 3 of the Convention. The State party notes that the Court applies a similar reasoning concerning article 6 of the Convention.[10]

4.11 Should the Committee find that the author's claims under articles 14 and 18 are not inadmissible *ratione materiae*, the State party argues that the claims are inadmissible for lack of substantiation. It submits that, prior to her removal to the United States, the author did not substantiate her claim that there was a reasonably foreseeable risk of a violation of articles 14 and 18 of the Covenant that was serious enough to trigger an obligation of the State party not to return her and her family. The State party notes that the United States is a democracy with constitutionally guaranteed protections of the right to a fair trial and freedom of religion and conscience. It further notes that the claims made by the author in her communication have already been assessed by the State party authorities, which found that the author had not provided adequate substantiation for her allegations.

4.12 The State party argues that the author's submissions relating to the court-martial proceedings in the United States are entirely systemic and do not include any evidence of her personal risk of an alleged unfair judicial process. It further observes that the United States has a fully functioning system of independent courts with clear avenues of judicial recourse, and submits that general allegations of a lack of fair trial rights in the United States cannot form the basis of a foreseeable risk of a serious violation of those rights if the author is returned.

4.13 The State party submits that the prosecution of the author for a criminal offence cannot be considered as persecution or as any other violation of her human rights. It notes that the author did not seek to be recognized as a conscientious objector prior to her

[10] The State party refers to the judgment of the European Court of Human Rights in *Tomic v. the United Kingdom*, application No. 17837/03, 14 October 2003.

departure from the United States, and did not seek any accommodation of her political or religious views that might have allowed her to complete her military service without placing her in conflict with her views. The State party notes that the author has referred to the Committee's views in *Yoon and Choi v. Republic of Korea*, *Jung et al. v. Republic of Korea* and *Jeong et al. v. Republic of Korea*. The State party argues that the author's case differs from those cases, as the author voluntarily enlisted for military service and her communication is, therefore, not a case of compulsory military service. It also submits that the author could have applied for conscientious objector status before going absent without leave, but chose not to do so considering that such an application would be unsuccessful, without substantiating her allegation that the status of conscientious objector was not available to her. The State party notes the author's allegation that she would face differential selection for prosecution and differential punishment upon conviction because of her political opinion and religious beliefs, if returned to the United States. However, it considers that the author has not provided any objective evidence to support this claim.

4.14 The State party further submits that the author's claims under articles 17 and 23 of the Covenant, read in conjunction with article 2 (3), are inadmissible *ratione materiae*. It notes that the author has not alleged any interference by the State party with her right to protection of her family. It also submits that it has not taken any steps to separate the members of the family and notes that they all left Canada together. The State party further notes that the alleged separation of the author from her family is not a direct result of the author's removal from Canada as, for the separation to occur, intervening actions by the United States are required. The State party therefore submits that, even if the author had substantiated her claim that she would be subject to foreseeable violations of articles 17 and 23 in the United States, this would not engage Canada's obligations under the Covenant, as the risks alleged by the author do not rise to the level of risk contemplated under articles 6 and 7 of the Covenant.

4.15 In the alternative, should the Committee find that the author's claims under articles 17 and 23, read alone and in conjunction with article 2 (3) of the Covenant, are admissible *ratione materiae*, the State party argues that the claims are inadmissible as the author has not substantiated, on a prima facie basis, her claim that her own and her family's removal was either unlawful or arbitrary. It submits that the author and her family accessed multiple administrative proceedings provided for by law, and that all relevant considerations were taken into account by decision-makers. The author and her family were afforded all procedural and substantive guarantees available, and the effects of removal on the author's family were considered at many different stages during these proceedings. The State party also submits that the author has not substantiated her claim that the removal would have a foreseeably disproportionate impact on her children or on the family as a whole. It argues that the author has not provided any evidence that her husband and children would be unable to obtain support from their extended family in the United States or that necessary services would not be available.

4.16 The State party notes that the author also alleged a violation of article 2 (3) of the Covenant in relation to her own and her family's removal prior to a determination on their second application on humanitarian and compassionate grounds. It submits that, if the author's submission in this regard is to be understood as an alleged violation independent of any substantive right under the Covenant, such a claim is inadmissible, since the accessory character of article 2 (3) is well established in the jurisprudence of the Committee.

4.17 Should the Committee find that the communication is admissible, the State party submits, on the basis of its observations on admissibility, that the communication is wholly without merit.

Author's comments on the State party's observations

5.1 On 3 February 2014, the author submitted her comments on the State party's observations. She maintains that the communication is admissible and argues that the State party's obligations as the removing State are not limited to articles 6 and 7 of the Covenant.

The author argues that the alleged violations of article 18 amount to persecution[11] and therefore irreparable harm, and that consequently the State party's obligations under the Covenant were engaged upon removing her to the United States. She also claims a violation of her rights under articles 9 and 19 of the Covenant. She submits that, when persecution results in imprisonment, such deprivation of liberty is arbitrary, in violation of article 9 of the Covenant. She also submits that, when the differential punishment relates to the expression of belief regarding military service, this amounts to a violation of article 19 of the Covenant. She submits that, at the very least, the culmination of the foreseeable violation of her rights under articles 9, 14, 18, 17 and 23 were sufficient to engage the State party's obligations under the Covenant.

5.2 The author further argues that the decision-makers of the State party failed to meaningfully engage with her claims under articles 14 and 18, amounting to a denial of justice. She notes that her claim that United States military tribunals are not independent and impartial, as required under article 14 of the Covenant, was raised for the first time in her second pre-removal risk assessment application. She further submits that, in support of her claim, she submitted an affidavit from a professor in military law from Yale University and a declaration from another professor and a legal practitioner, as well as an affidavit from an attorney practising in the field of military law in the United States, according to whom United States military tribunals would not be considered independent and impartial when assessed according to international standards. She also notes that the Federal Court in the case of *Tindungan v. Canada* (decision No. 2013 FC 115 of 1 February 2013) found that the United States military tribunal system does not comply with Canadian or international norms.[12] She argues that this evidence was disregarded by the pre-removal risk assessment officer, who found that criticism of the fairness of the United States court martial system and the assertion that it needed improvements and did not measure up to Canadian or other international standards did not, in and of itself, make the system unfair. The author further argues that it would have been entirely futile for her to seek protection of her fair trial rights under appellate review in the United States. The author argues that the evidence that she submitted in support of her claims clearly demonstrates that the United States military tribunal system does not meet the requirements stipulated in article 14 of the Covenant. She notes that she was, in fact, arrested, detained and selected for court martial upon arrival in the United States. Upon her return to Fort Carson, she was placed on base restriction from September 2012 until her court martial on 29 April 2013. At court martial, she was found guilty of desertion and sentenced to 14 months' incarceration. Pursuant to a pretrial agreement, she was required to serve only 10 months of the sentence imposed and was released on 12 December 2013.[13] She submits that her rights under article 14 of the Covenant were violated through her removal to the United States and that these violations were entirely foreseeable.

5.3 The author argues that the State party authorities did not comprehensively consider her claims under article 18 of the Covenant. She argues that they did not address two of her arguments in that regard, namely whether she would face punishment for refusing to perform military service where that refusal was motivated by a deeply-held conscientious objection to service and whether she would face punishment for refusing to perform military service where that refusal was motivated by a deeply-held refusal to be associated with condemned military actions in Iraq.

5.4 The author maintains that, in compliance with United States military regulations, she was not entitled to a discharge with the status of conscientious objector in 2007, as she was

[11] The author refers to Office of the United Nations High Commissioner for Refugees, "Guidelines on international protection No. 10: Claims to refugee status related to military service within the context of article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (HCR/GIP/13/10) (2013), para. 14.

[12] The author notes that it is stated in the decision that the United States military justice system appeared to be outdated and at odds with Canadian and international norms.

[13] The author notes that she was released early as she had undertaken courses and activities in prison which entitled her to have days deducted from her sentence.

a selective objector.[14] She argues that, even if she had submitted such an application, she would have been deployed back to Iraq while her application was pending. The author further argues that the application process for conscientious objector status in the United States is unduly prolonged[15] and that applicants have been reported to have been subjected to discrimination and mistreatment in their units during the processing of the application. The author submits that no adequate process exists through which she would have been able to obtain relief from military service in 2007, and that her only option was to desert her unit. The author argues that her removal to the United States, when it was reasonably foreseeable that she would face incarceration for her refusal to participate in military service, and given that this refusal was motivated by a sincerely-held conscientious objection to military service although she could not put forward this motivation during her court martial, amounts to a violation of her rights under article 18 of the Covenant.

5.5 The author also maintains that she was facing a foreseeable differential punishment for desertion upon return to the United States because of her sincerely-held and publicly-expressed objection to military service. The author argues that military prosecutors in the United States treat individuals differently when exercising their prosecutorial discretion, on the basis of individual soldiers' profiles as outspoken critics of the war efforts in Iraq or Afghanistan led by the United States.[16] The author submits that evidence she had submitted before the State party authorities in this regard clearly demonstrated a foreseeable risk that she would be subjected to differential and more severe punishment if returned to the United States. She submits that this differential treatment amounts to persecution in violation of her rights under article 18 of the Covenant.

5.6 The author further maintains that her complaint with respect to the alleged breaches of her rights under articles 17 and 23 is admissible. She refers to her initial complaint and argues that her arrest and incarceration following her removal to the United States necessarily and foreseeably resulted in her separation from her family.

5.7 Concerning her claim under article 2 (3) of the Covenant, the author refers to her initial submission and submits that her claims are at least admissible insofar as they are linked to other alleged violations of the Covenant. She argues that, should the Committee find that the State party violated her rights by removing her to the United States, then the State party's failure to remedy these violations amounts to a violation of her rights under article 2 (3) of the Covenant, as the domestic procedural mechanisms in place were ineffective and could consequently not constitute an effective remedy.

5.8 The author requests the Committee to recommend that the State party provide her with financial damages to compensate her for the mistreatment she suffered as a consequence of the State party's decision to remove her to the United States and that the author and her family be granted residence permits enabling them to return to the State party.

State party's further observations

6.1 On 14 July 2014, the State party submitted its observations on the author's comments. It reiterates its initial submission on the admissibility and merits of the communication. The State party notes that, in her comments, the author has submitted additional claims under articles 9 and 19 of the Covenant. It refers to its arguments in the

[14] The author refers to United States Department of Defense Directive 1300.06, according to which a conscientious objector is someone who has a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reasons of religious training or belief. The author notes that it is further stipulated in the decree that the term "religious training or belief" does not include a belief which rests solely upon considerations of policy, pragmatism, expediency or political views.

[15] The author refers to A/HRC/23/22, para. 66, in which it is noted that gaining recognition of conscientious objector status could take over two years.

[16] The author refers to declarations from a professor, a practitioner in the field of military law, an attorney practising in the field of military law and a colonel and to affidavits from former United States soldiers who assert that individuals who go absent without official leave because of their sincerely-held and publicly-expressed conscientious objection to service with the United States military in Iraq receive differential and more severe treatment from the military authorities.

initial submission with respect to articles 14 and 18 and submits that the author's claims under articles 9 and 19 should be found inadmissible on the same grounds.

6.2 The State party notes that, in her comments, the author asserts that at the time of her removal to the United States she faced a foreseeable risk of persecution and irreparable harm, as defined in international refugee law in the United States. It argues that the author has not explained why treatment amounting to persecution would always — or even presumably — amount to the infliction of irreparable harm of the kind contemplated by articles 6 and 7 of the Covenant. The State party further notes that the author has not supported her position by reference to any general comments or views issued by the Committee, statements by United Nations special rapporteurs or academic writings. It considers that the issue of whether certain treatment might be considered persecution for the purposes of international refugee law is irrelevant for the purpose of interpreting States parties' obligations under the Covenant. The State party submits that different protections accorded by different treaties should not be conflated, as they are inextricably embedded within distinct international legal regimes. It argues that, within the context of the individual complaints procedure established by the Optional Protocol, the Committee is competent only to consider alleged violations of an individual's Covenant rights and is not competent to address the appropriate interpretation of the Convention Relating to the Status of Refugees. It further notes that the author's comments also contain lengthy analysis relating to the laws, judicial processes and actions of the United States and considers that the author appears to wish the Committee to express its views on the fairness of the military justice system of that country.

6.3 The State party maintains that the kind of foreseeable violations alleged by the author do not rise to a level of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant. It argues that the author has provided no argument to explain why a court martial for desertion and a sentence to a term of imprisonment as punishment upon conviction would amount to irreparable harm. The State party submits that there is no basis for considering that conducting a court martial for desertion from military service is per se a violation of the Covenant, that a court martial for desertion is inherently flawed in terms of human rights or that it targets conscientious objectors such as the author.

6.4 The State party considers that the crucial issue of the communication is what was foreseeable at the time of removal, but submits that the author does not appear to have actually experienced any irreparable harm as a result of her removal from the State party.

6.5 The State party also reiterates its observations on the admissibility and merits of the communication in regard to the author's claims under articles 17 and 23 of the Covenant. Concerning the author's claims under article 2 (3) of the Covenant, read in conjunction with articles 9, 14, 17, 18, 19 and 23, the State party argues that the author's claims that her removal from Canada was a violation of the State party's obligations is not sufficiently well-founded, as they fall outside the scope of the State party's obligations under the Covenant. The State party submits that its immigration and protection laws and policies satisfy its obligations under article 2 (3) in the context of removals, and have not been shown to have failed in the author's case.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the author's claim that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

7.4 The Committee notes the author's claim that the State party violated her rights under articles 9, 14, 18 and 19, read alone and in conjunction with article 2 (3) of the Covenant, by removing her to the United States. The Committee notes the author's claim that, upon removal by the State party to the United States, she faced a real and foreseeable risk of persecution based on her status as a conscientious objector; of being subjected to court-martial proceedings before a tribunal that was not independent and impartial; and of selection for court martial and subsequent imprisonment and differential and more severe punishment owing to her refusal to perform military service, based on her publicly-expressed status as a conscientious objector, her opposition to the United States military involvement in the conflict in Iraq and her refusal to be associated with condemned military conduct. The Committee also notes the State party's argument that its non-refoulement obligations do not extend to potential breaches of articles 9, 14, 18 and 19 of the Covenant and its argument that the complaint should be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol, as well as under article 2 of the Optional Protocol on the grounds of lack of substantiation. The Committee further notes the author's argument that the State party's non-refoulement obligations are not limited to potential breaches of articles 6 and 7 of the Covenant and that she has sufficiently substantiated her claims for purposes of admissibility.

7.5 The Committee recalls its general comment No. 31, paragraph 12, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant. The Committee has also indicated that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high. [17] The Committee further recalls its jurisprudence in *Ch.H.O. v. Canada* (communication No. 2195/2012, decision adopted on 3 November 2016), in which it found that the State party had not violated the author's rights under article 18 by deporting him to the Republic of Korea, where it was foreseeable that he would be prosecuted and sentenced to imprisonment for refusal to perform military service, as the author had not substantiated the claim that such prosecution and imprisonment would amount to irreparable harm. The Committee notes that the author has not claimed that she would face a risk to her life or that she would risk being subjected to torture or to cruel, inhuman or degrading treatment or punishment upon return to the United States. The Committee also notes that the author does not provide any arguments that would enable the Committee to conclude that a court martial and conviction — to which she has since been subjected — would amount to irreparable harm such as that contemplated in articles 6 and 7 of the Covenant. Accordingly, the Committee considers that the author's communication falls short of substantiating her claim that, by removing her to the United States, the State party exposed her to a risk of irreparable harm such as that contemplated in articles 6 and 7 of the Covenant. The Committee therefore finds this part of the communication inadmissible under article 2 of the Optional Protocol.

7.6 The Committee notes that the author has also claimed that there was a foreseeable risk that her family's interests would be substantively and negatively affected by her removal to the United States, that she would be separated from her family by imprisonment and that the removal would not be in the best interests of her children, all amounting to a violation of her rights under articles 17 and 23, read alone and in conjunction with article 2 (3) of the Covenant. The Committee also notes the State party's argument that its non-refoulement obligations do not extend to potential breaches of articles 17 and 23 of the Covenant and that the complaint should be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol, as well as under article 2 of the Optional Protocol for lack of substantiation.

7.7 The Committee recalls its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain on its territory would constitute

[17] See communications No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 9.2; No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6; No. 1833/2008, *X v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain on the territory of a State party does not necessarily mean that requiring other members of the family to leave constitutes such interference.[18] The Committee recalls its general comments No. 16 (1988) on the right to privacy and No. 19 (1990) on the family, whereby the concept of the family is to be interpreted broadly. It also recalls that the separation of a person from his or her family by means of expulsion could be regarded as arbitrary interference with the family and a violation of article 17 if, in the circumstances of the case concerned, the separation of the author from his or her family and its effects on him or her were disproportionate to the objectives of the removal.[19] In the present case, the Committee observes that the author and her family were removed to the United States together, that their extended family resides in the United States, that the author has not alleged that she had no extended family network available in the United States which could provide support for her family during her imprisonment, and that the family only resided in the State party for a period of five years. Given these circumstances, the Committee finds that the author has failed to provide any arguments that would enable the Committee to conclude that her own and her family's removal from the State party to the United States would amount to irreparable harm. The Committee therefore finds that the author has failed to substantiate, for purposes of admissibility, her claims under articles 17 and 23, read alone and in conjunction with article 2 (3) of the Covenant. Accordingly, the Committee declares that the author's claims under articles 17 and 23, read alone and in conjunction with article 2 (3) of the Covenant, are inadmissible under article 2 of the Optional Protocol.

7.8 The Committee notes the author's claim that the State party violated article 2 (3) of the Covenant by forcibly removing her and her family prior to an adjudication of their second application for permanent residence based on humanitarian and compassionate grounds. The Committee also notes the State party's argument that the author's claim should be held inadmissible insofar as article 2 (3) of the Covenant is accessory in nature and cannot give rise to an independent right or be subject to a separate claim in a communication under the Optional Protocol. The Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant lay down general obligations for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.[20] The Committee thus considers that the author's claims under article 2 of the Covenant are inadmissible under article 3 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That the decision shall be communicated to the State party and to the author.

---

[18] See, for example, communications No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 8.7; No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.1; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.7; No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, para. 11.5; No. 1792/2008, *Dauphin v. Canada*, Views adopted on 28 July 2009, para. 8.1.

[19] See communication No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997, para. 11.4.

[20] See, for example, communications No. 2202/2012, *Castañeda v. Mexico*, Views adopted on 18 July 2013, para. 6.8; No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility adopted on 23 July 2012, para. 8.5; No. 1887/2009, *Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4; No. 2343/2014, *H.E.A.K. v. Denmark*, Views adopted on 23 July 2015, para. 7.4.